

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In re)
Comcast Corporation) MB Docket No. 10-56
)

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**CONSOLIDATED REPLY TO RESPONSES
OF COMCAST, REVOLT AND ASPIRE**

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SUMMARY

In their responses to the Petition, Comcast Corporation, Aspire and Revolt join forces to try to bluff, bluster and strong-arm their way past the Commission.

Comcast shockingly suggests that, even though it included its MOU commitments as part of its merger application, and even though the Commission considered those commitments in detail in reaching its public interest determination underlying the grant of that application, the Commission is now impotent to investigate whether or not Comcast has complied with those commitments. But to the extent that consideration of those commitments was an integral component of the Commission's ultimate public interest determination, the Commission is plainly within statutory authority to investigate precisely such matters. Indeed, since it is the Commission's statutory obligation to act in the public interest, so to ignore clear evidence that public interest considerations are not being met would be contrary to the Commission's duties.

Moreover, since Comcast presumably intended its various MOU commitments to be considered by the Commission, and since Comcast's subsequent actions strongly suggest that it had no serious intention of complying with those commitments, the Commission may also conclude that Comcast has engaged in misrepresentation or lack of candor in its submissions to the agency. That, too, warrants Commission investigation.

Comcast, Aspire and Revolt attempt to convince the Commission they are independently owned and controlled African American program producers. Those attempts fall well short of their intended goal because neither Comcast, nor Aspire, nor Revolt provides anything more than *ipse dixit* claims that run counter to otherwise available information. As various authorities – from the Supreme Court to the Commission itself – have concluded, questions of ownership and control should not, indeed cannot, be resolved without thorough review of all relevant underlying

documents reflecting the rights, duties, investments and other relationships among the various participants. No such documents have been provided by Comcast, Aspire or Revolt, nor has any of them provided the Commission with anything more than glib, self-serving claims which are, in view of other available information, facially dubious.

While Comcast touts its carriage of African American-oriented programming, careful examination demonstrates that that programming is, for the most part, the product of white-owned companies with ties to Comcast.

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1. With an impressive combination of misdirection, obfuscation and bloviation, Comcast Corporation (“Comcast”) – with assistance from Revolt and Aspire – attempts in its Opposition to assure the Commission that, contrary to the assertions of Entertainment Studios, Inc. (“ESI”) and the National Association of African American-Owned Media (“NAAAOM”) (collectively, the “Petitioners”), the Commission need not – indeed, cannot – investigate Comcast’s compliance with the conditions imposed on it by the Commission. The efforts of Comcast, Revolt and Aspire, however, are nothing more than unpersuasive sound and fury, ultimately signifying nothing.¹ In fact, Comcast’s Opposition underscores the need for such an investigation.

DISCUSSION

2. While Comcast’s Opposition raises a number of subsidiary points, its principal point appears to be that, contrary to the Petitioners’ assertions, the two supposedly African American-owned and controlled program services Comcast has added to its line-up – *i.e.*, Aspire and Revolt – really are African American-owned and controlled. Comcast falls far short of proving its point.²

¹ Shakespeare, *MACBETH*, Act 5, Scene 5.

² In an apparent effort to distract the Commission, Comcast spends a considerable amount of time rambling on about how the Petitioners are “serial litigators”, as if that somehow undercuts the merits here. The fact that Petitioners have regrettably been forced to litigate their grievances does not by any means alter the validity of their factual and legal arguments both in their litigation and in their Petition to the Commission. Comcast’s effort to tar the messenger in order to blunt the effectiveness of the message is unavailing. It should also be noted that Comcast’s snide suggestion that ESI’s litigation is merely an attempt to gain cable carriage because its efforts in the marketplace to gain such carriage have been unsuccessful is woefully off the mark. The programming of ESI – a 100% African American-owned and operated company – is carried on scores of cable systems nationwide and reaches almost 80,000,000 subscribers.

The Commission has the authority to undertake the requested investigation.

3. Before that shortfall is addressed, though, it is essential that the Commission recognize by far the most troubling aspect of the Opposition: Comcast's repeated suggestion that the Commission has no authority to initiate the investigation sought by the Petitioners. *See* Comcast Petition at 2, 3, 10, 14. That suggestion reflects an astonishing disdain for the Commission and its authority.

4. After all, in order to approve the Comcast/NBCU merger in the first place, the Commission was statutorily obligated to determine that the merger was in the public interest, convenience and necessity. To assist the Commission in making that determination, Comcast voluntarily entered into various Memoranda of Understanding (MOUs) and then, importantly, Comcast submitted those MOUs to the Commission as part of its application. In so doing, Comcast incorporated the representations and commitments contained in the MOUs into its application, and the Commission expressly considered those representations and commitments and relied on them in formulating its ultimate public interest determination.

5. In view of that, it is frivolous – indeed, contumacious – for Comcast now to claim that the Commission is powerless to hold Comcast to its commitments.

6. From the Commission's perspective, acceptance of Comcast's proposition would signal to the world that the Commission's embrace of "voluntary" commitments as a means of ensuring desired public interest results from Commission-approved transactions is nothing but a charade. Yes, the parties may seem sincere in their promises to do good, and the Commission may seem equally sincere in its admonitions concerning compliance with those promises. But if Comcast is correct, then once the ink from the grant stamp is dry, all promises may be ignored with impunity. What of the public interest benefits of those promises that the Commission may have seemed to rely on? In the words of Emily Litella, "Never mind".

7. To endorse Comcast's claim would place the Commission in an untenable posture in which it acknowledges that its regulatory authority is, at best, illusory. The Petitioners urge the Commission to reject that notion as strongly as possible. The signal the Commission has already sent to the industries it regulates by ignoring Comcast's non-compliance thus far has prompted others to follow in Comcast's footsteps, using the Comcast *modus operandi* of entering "voluntary" MOUs to shore up an otherwise shaky public interest showing. By letting Comcast slide for years now, the Commission has encouraged those others with the thought that they can make whatever "voluntary" promises that might sound good, comfortable in the knowledge that the Commission will never hold them to those promises.

8. The Commission can and should make clear, as forcefully as possible, that Comcast's claims in that regard are wrong.

Comcast fails to rebut evidence concerning its non-compliance.

9. Comcast takes issue with the notion that Aspire and Revolt may not, in fact, be owned and controlled by African Americans. Comcast chides the Petitioners because they can't point to specific data when they make that claim. But then, as it turns out, neither can Comcast when it attempts its rebuttal. While Comcast repeatedly asserts that Aspire and Revolt are majority owned by African Americans – as if by dint of repetition that assertion might acquire credibility – it offers no proof. Instead, Comcast's claims are based solely on "representations" to that effect provided by Aspire and Revolt. *See* Opposition at 6, 11; Gaiski Dec., ¶2. That is, Comcast's claims are based on hearsay.

10. Presumably to address that weakness, both Aspire and Revolt have submitted their own separate statements repeating the assertion that each is African American-owned and controlled. But let's take a close look at exactly how they support that claim.

11. For its part, Revolt offers a terse one-page letter, the substance of which consists of two paragraphs:

The Company is privately held and therefore is under no obligation to disclose any specific facts about its ownership structure or the identity of its equity or debt holders. However, for the record, I will categorically state the following: Since its founding in 2011, the Company has been and continues to be an African American-owned and controlled company.

More specifically, contrary to paragraphs 32-33 of the Petition, Comcast Corporation ("Comcast") does not and has never owned any interest in the Company. The Company is proud, however, of its association with Comcast. Comcast has played a significant role in Revolt's launch and distribution, and continues to work cooperatively and productively to enable increasing access to Revolt by Comcast's customers.

Note that Revolt provides absolutely no detailed information that might corroborate its claim. It does not provide its underlying Operating Agreement, nor does it set out its ownership structure and capitalization, nor does it describe in any detail Comcast's "significant role", nor does it provide any agreements between Revolt and Comcast that might illuminate that role. Instead, Revolt defiantly and defensively asserts that it is under "no obligation to disclose any specific facts" about its ownership or control. So the Commission is left with an *ipse dixit* assertion: Revolt is African American-owned and controlled because, well, because Revolt says it is. That doesn't count as proof of anything.³

12. Aspire is somewhat more forthcoming. In a section titled "Governance and Ownership of Aspire", it advises that:

Limited Liability Company Agreement for Aspire Channel, LLC, dated as of April 3, 2012 ("LLC Agreement"). Pursuant to the LLC Agreement, a Board of Managers manages the business of Aspire. The Board of Managers is comprised of five managers, and a trust for which Mr. Johnson is the sole trustee appoints three of the five managers. Mr. Johnson was one of the initial managers and continues to serve as a manager and Executive Chairman of the Board of Managers. Thus, Mr. Johnson controls the management of Aspire.

³ Revolt's credibility is, in any event, dubious. For example, Revolt states that it is proud of its association with Comcast. However, Petitioners understand Revolt representatives felt the need to reach out to Congresswoman Maxine Waters out of concern for possible disruption of their distribution and license fee protection from Comcast. Pride, it would appear, only goes so far.

The trust for which Mr. Johnson is the sole trustee owns 95.5% of the Common Units of Aspire while UP Entertainment, LLC owns 4.5% of those units, which ensures Mr. Johnson's continued control of Aspire. There is also a series of Preferred Units owned by the Yucaipa Funds, which share in Aspire distributions and appoint one of the five managers.

This at least specifically acknowledges that there is an LLC Agreement which establishes a Board of Managers to “manage[] the business of Aspire”. But it doesn’t mention *how* it does so or what “business” it manages (a point we’ll get to in more depth below). Aspire’s disclosure also provides some minimal insight into its ownership structure. We now know, for example, that there are at least two types of ownership (“Common Units” and “Preferred Units”), and that white-controlled entities – UP Entertainment, LLC (“UP TV” and Yucaipa Funds – are owners.

13. What we don’t know, however, is the extent of the various financial contributions of the various owners. Nor do we know what rights and/or powers any of the owners – or any of the “managers” – may hold. We do know, though, that an owner of Preferred Units appoints one of the managers, *i.e.*, 20% of the board. But we don’t know what power that single manager might have. If, for example, that individual can unilaterally block company actions, or otherwise exercise authority that effectively controls company conduct, that would seriously undermine the blanket assertion that “Mr. Johnson controls the management of Aspire.”

14. So again, the Commission is left with an *ipse dixit* assertion – more elaborate than Revolt’s, to be sure, but still a naked assertion.

15. Of course, both Aspire and Revolt could have conclusively proven the validity *vel non* of their claims by simply providing primary information – operating and other agreements, capitalization data, etc. – on which those claims are based. Neither did.

16. The Commission should have learned long ago – in the era of minority preferences in broadcast licensing – that claims of control often turn out to be seriously misleading (if not

flatly misrepresentative) once the full facts and circumstances are disclosed. In reviewing the Commission's minority preference programs, Justice Anthony Kennedy summarized the problem:

[S]pecial preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion.

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting).⁴ As an example of such improper exploitation, Kennedy referred to an applicant to which the Commission had accorded a substantial benefit based on the applicant's *ipse dixit* claim to being Hispanic-controlled. Much like Aspire's disclosure, the applicant there had assured the Commission that, because an Hispanic individual owned 21% of the applicant's overall equity and 71% of its voting equity, it was most assuredly Hispanic-controlled.

17. But, as Kennedy noted, that was not the entire story. As the facts eventually came out (well after the Commission had blessed this particular applicant), the applicant had a total capitalization of \$24,000,000, of which the supposedly controlling Hispanic individual had contributed a total of (wait for it) \$210. *Id.* Kennedy plainly did not believe that, as a practical matter, that disproportionate capitalization could legitimately support a claim of "control" by the individual, regardless of the purported equity structure. It defies normal experience to believe that a person who contributed a total less than one one-hundred thousandth of the company's capital could be deemed to be in "control" of that company.

18. In other words, the potential for improper exploitation in such matters is high, and casual claims of control based on self-serving characterizations of otherwise undisclosed

⁴ Of course, the Court's decision in *Metro*, which upheld the Commission's preference programs, was expressly overruled (on other grounds) by the Court five years later, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

information cannot be relied upon. Stated more pithily, experience demonstrates that, in such matters, it is prudent to *follow the money*.⁵

19. Entities with bona fide claims of being under the control of, *e.g.*, African Americans should be able to provide available primary documentation to support their claims. And they should not hesitate to do so, particularly when they are relying on those claims to obtain very substantial benefits being denied to others, in part, on the basis of the claims. Given the opportunity to eschew the *ipse dixit* in favor of detailed disclosure, however, neither Aspire, nor Revolt, nor Comcast has done so. Even if their reluctance in that regard does not raise any doubts in the Commission's mind (and it should, given the Commission's own historical experience), the fact that they have chosen to leave serious questions unanswered gives the Commission no alternative but to undertake the investigation which the Petitioners have sought. That investigation should begin with the required disclosure of the financial arrangements (including, but not limited to, capitalization, loans and other similar components) that reflect the true extent of monetary risks and rewards underlying Aspire and Revolt.

20. It should also include disclosure, and careful examination of, all agreements relating to the ownership and operation of the two companies (*e.g.*, LLC operating agreements, trust and loan agreements, etc.) that reflect the true locus of control in each. Are these companies truly African American-owned and controlled, or are they simply entities built on the capital of white persons who are in a position to control their operations and who derive the financial

⁵ This notion is not foreign to the Commission. In a separate but related context, the Commission has recently made clear that mere assertions of "independence" do not establish that independence in fact exists. In *Northstar Wireless, LLC et al.*, No. 15-104 (released August 18, 2015), the Commission emphasized that claims of eligibility for "designated entity" status in Commission auctions require the Commission to "closely examine[] the totality of the facts and circumstances of each case to ensure" that the claim is valid. No less scrutiny is warranted here.

rewards therefrom, while their supposedly “spearheading” African Americans make mere cameo appearances as necessary to maintain the illusion and pick up the occasional check? Comcast would have the Commission believe the former, while the information generally available strongly indicates the latter.

21. In their Petition, the Petitioners also raised questions about precisely who is operating Aspire. In particular, based on various sources, it appears that Aspire is being run largely as a subsidiary of the UP TV (f/k/a Gospel Music Channel, or “GMC”). In response, Aspire tells us (in a section headed “Operation of Aspire”) that

[w]hen Aspire was formed, Mr. Johnson entered into a services Agreement pursuant to which he exercises control over the management, operation and creative development efforts of Aspire. His duties include overseeing UP's performance of services for Aspire. Mr. Johnson exercises that control personally and through Magic Johnson Enterprises.[⁶]

Again, we are left with little more than the *ipse dixit* assertions that Mr. Johnson exercises some kind of control because he, well, exercises some kind of control, although not necessarily personally. But at least this disclosure confirms that UP TV performs “services” for Aspire, which confirms to some degree what the Petitioners alleged.

22. Aspire does provide a brief section entitled “Services Provided by UP Entertainment”. In relevant part⁷ it reads:

⁶ This section of Aspire’s letter also contains two paragraphs in which the letter’s author describes, vaguely, some of her own activities (*e.g.*, attending a conference, communicating with other Aspire executives). Those paragraphs do not, however, shed any light on the conduct of Aspire’s actual day-to-day operations.

⁷ This section of Aspire’s letter also includes a paragraph conceding that UP TV (then GMC)—*not* Aspire itself—filed to register the “ASPiRE” trademark in February 2012. Aspire wants the Commission to know that, eventually, Aspire did acquire that mark from UP TV in 2013. Petitioners do not dispute that. But Aspire does not explain why it was UP TV (or GMC) that registered that mark in the first place. The fact that UP TV did so suggests that the notion of “Aspire” may have been UP TV’s idea from the get-go, and not Mr. Johnson’s or anyone else’s—which would be consistent with the possibility that Aspire may be little more than a subsidiary of UP TV’s other operations.

UP Entertainment provides various services to Aspire. As a start-up programming service, Aspire has sought to benefit from UP's existing infrastructure and experience. UP's (then Gospel Music Channel) "partnership" with Aspire was disclosed to Comcast by virtue of the disclosure that UP was providing services to Aspire. By using these services, Aspire, which was formed on February 1, 2012, was able to launch by late June 2012.

Aspire has had its own employees (ranging from approximately 10-15) since shortly after its inception, and, as noted above, Mr. Johnson, directly and through Magic Johnson Enterprises, supervises the services provided by UP to Aspire. The fact that Aspire obtains cost-effective services from UP does not affect its independence.

What does this tell us about the nature of the services provided to Aspire by UP TV? (Take your time and feel free to re-read the two paragraphs, slowly.) The answer: Nothing, as far as the Petitioners can tell. The services are "various", they somehow involve UP TV's "existing infrastructure and experience", they are supervised in some way by Mr. Johnson or an entity which bears his name, and they are "cost-effective". But precisely what services are provided, how often, on what basis, and subject to what level of supervision? Aspire has chosen not to share that information with the Commission.

23. As Petitioners demonstrated, the public record contains strong indications that UP TV is effectively running the Aspire operation, top to bottom. The Aspire showing does nothing to discount those indications. Again, since the parties' general denials lack any specificity, much less documentary or other independent support, the Commission's only recourse is to undertake its own investigation, as the Petitioners have argued.⁸

⁸ In comments filed in the Commission's program diversity inquiry (MB Docket No. 16-41), Comcast has characterized its carriage arrangements generally as "benign". See Comcast Comments in Docket No. 16-41 at 24-32. If that is, indeed, the case, then Comcast should not hesitate to disclose for the Commission's (and others') review the Aspire and UP TV carriage agreements, which Petitioners suspect are linked in ways which undermine the fanciful notion that Aspire is indeed independent. If Petitioners are wrong in that regard, disclosure of the agreements themselves would presumably bolster Comcast's claims. Comcast should also not hesitate to disclose how much it pays to white-owned and controlled companies for carriage of their programming as opposed to 100% African American-owned companies for carriage of theirs. Petitioners are confident that that last comparison would provide a stark and irrefutable *prima*

24. In its Opposition, Comcast aggressively denies that it is an owner of Revolt, contrary to at least one published report. *See* Comcast Opposition at n.6. What Comcast does not deny is the curious web of parties, identified in the Petition, who seem to have interests in or close ties to Comcast and/or Aspire and/or Revolt. We may reasonably conclude that that web of parties exists. And, in Petitioner's view, that web illustrates Comcast's preference to work with white-owned and/or controlled entities, rather than 100% African American-owned and controlled companies.

25. For example, Ron Burkle and his company, Yucaipa Funds. Aspire acknowledges that Yucaipa is an owner in Aspire with sufficient clout to hold the right to appoint 20% of its Board of Managers. (Its clout may extend further but, since the Commission has not been provided with Aspire's organizational documents, it can't say for sure.) But Mr. Burkle was also reported to be a source of Revolt's funding as well. And, in a footnote to its letter, Aspire also acknowledges that the Yucaipa Companies are in a partnership with Magic Johnson Enterprises, which partnership owns (along with Intermedia Partners, LP) an entity called Soul Train Holdings, LLC, which happens to provide programming to Aspire.

26. And there's J.P. Morgan, one of whose subsidiaries is another funding source for Revolt. While denying any affiliation with Revolt, Comcast does not deny that Stephen Burke, an Executive Vice President of Comcast and the CEO and President of NBCU sits on the Morgan board. Additionally, in the Small World department, a Managing Director of Highbridge Principal Strategies (the Morgan subsidiary that is financing Revolt) happens to be one Payne Brown, who until 2011 was Vice President of Strategic Initiatives and a corporate officer at Comcast, where he served on the cable division's executive committee.

facie demonstration of racial discrimination and deplorable lack of programming produced by 100% African American-owned media.

27. And then there's UP TV. A white-owned company with a longstanding relationship with Comcast, it is one of only two owners of Aspire's "Common Units" (according to Aspire). And it provides "various services" to Aspire. Petitioners understand that UP TV is owned by Intermedia Partners, LP, the same white-owned company that shares ownership of Soul Train Holdings, LLC with an Aspire partnership. And, as outlined in some detail in the Petition, UP TV's interest in African American-oriented programming also caused it to become involved with the Black Family Channel ("BFC"), which was reportedly placed in precarious financial straits because of unfavorable treatment by Comcast after BFC reportedly declined to sell Comcast an interest in BFC. As a result of those financial straits, BFC ended up selling UP TV many if not most of its assets, which UP TV then used in its network(s) carried on Comcast.

28. In its Opposition, Comcast denies in very broad, non-specific terms the Petitioner's assertions concerning Comcast's interactions with BFC. According to Comcast, "Petitioners' claims regarding the Black Family Channel are false". Comcast Opposition at 13. In support of that claim Comcast cites to a declaration appended to its Opposition. In relevant part that declaration reads:

Based on my involvement in programming and content acquisition and in this negotiation at the time, my clear understanding is that Comcast did not seek an ownership interest in the Black Family Channel, and Comcast did not attempt to condition additional carriage of the network on obtaining such an ownership interest.

Gaiski Dec. at ¶9. With all due respect, this does not really rebut the detailed allegations presented by the Petitioners, which allegations are based on a statement (first submitted to the Commission in 2011) from a former BFC principal who had first-hand knowledge of the circumstances. By contrast, Ms. Gaiski merely expresses her "understanding". She provides no indication of what role (if any) she played in any interaction between BFC and Comcast which may have given rise to that "understanding". Nor does she deny that, for whatever reason, Comcast did curb carriage of

BFC immediately after BFC's alleged refusal to sell Comcast an interest in BFC, whether or not that curbing was related to any such refusal.

***Comcast's track record of carriage of independent
African American-owned programmers is non-
existent.***

29. Importantly, Comcast's tendency to deal with largely white-owned companies – even when it comes to African American programming – appears elsewhere in Comcast's Opposition, although not expressly. Comcast goes to considerable lengths to demonstrate that it is a “proud supporter of African American programming”. Comcast Opposition at 4. It cites five networks in particular, presumably because Comcast believes those five to be the best exemplars of its engagement with the genre. *Id.* The five are the Africa Channel, BET, Centric, UP TV and TV One. Let's examine them.

30. BET and Centric are both owned by Viacom, a publicly-traded company not generally regarded as an African American-owned.

31. UP TV, as we have seen, is white-owned, with a long association with Comcast.

32. TV One is currently owned by Radio One, which was founded by African Americans (although it is currently publicly owned). But wait. Radio One has owned 100% of TV One only since 2015. In fact, TV One was founded jointly by Radio One **and Comcast**, which held a greater than 47% interest in TV One until 2015. And, perhaps only by coincidence (or perhaps not), Comcast joined forces with Radio One to create an African American-oriented channel contemporaneously with Comcast's reported unsuccessful effort to acquire an interest in BFC. So while TV One may be an excellent source of African American programming, it cannot be said to have been 100% owned or necessarily controlled by African Americans for long. And interestingly, in December, 2014 – shortly before Comcast sold off its interest in the network – TV

One hired a new President, one Brad Siegel. Mr. Siegel (who is white) happened to be a co-founder and vice chairman of UP TV.

33. So four of the five networks which Comcast touts as exemplifying its carriage of African American programming are either owned and controlled by whites (BET, Centric, UP TV) or were created and, until very recently, substantially owned by Comcast itself (TV One). That is, they offer only “black-targeted” programming.⁹ And immediately before Comcast sold its interest in TV One, a longtime veteran – indeed, founder – of UP TV took over as President of TV One.

34. This clearly suggests that Comcast prefers to deal with white-owned or controlled companies even when it comes to African American programming.

35. Of course, there is the fifth network listed by Comcast, *i.e.* the Africa Channel. That does appear to be owned and controlled by African Americans. But dig a little deeper and we find that one of its owners is Williams Group Holdings, LLC, one of whose principals is Paula Williams Madison. Again in the Small World department, Ms. Madison also happens to have enjoyed more than two decades as an executive of NBCU. So presumably Ms. Madison is a member of the unusually small network, or web, of friends and acquaintances with whom Comcast chooses to do business.

36. In any event, it is clear that, contrary to Comcast’s protestations, its commitment to African American programming appears to stop well short of independent networks 100% owned

⁹ It is important to understand that there is a substantial difference between such white-produced programming trying to reach the African American audience, on the one hand, and programming produced for that audience by African American-owned and controlled companies. By referring to “African American”-targeted networks – as opposed to African American-owned networks – Comcast attempts to create the false impression that it is advancing diversity and economic inclusion. The Commission should be careful *not* to allow itself to continue to be manipulated in this way. In fact, 100% African American-owned programmers do not, as a practical matter, get to share in the \$10 billion in carriage fees paid by Comcast to white cable owners. Of the nearly 500 channels carried by Comcast, not one is owned by 100% African American owned and controlled media.

by African Americans. And as discussed above and in the Petition, Aspire and Revolt appear to fit Comcast's preferred mold precisely – even down to the substantial involvement of UP TV in Aspire's operation. It is difficult to imagine that the selection of those two channels over as many as 90+ other contenders was the result of a fair and non-discriminatory process.¹⁰ That being the case, the Petitioners renew their request that the Commission undertake a detailed investigation of Comcast's compliance with the conditions imposed on it by the Commission.

CONCLUSION

37. By touting a commitment to independently owned and operated African American programming, Comcast – and, by extension, the Commission – cloaked themselves in the mantle

¹⁰ With respect to that process, a couple of points should be noted.

First, contrary to Comcast's claims, ESI did in fact submit a formal proposal to Comcast in response to the request for proposals issued in connection with Comcast's supposed effort to comply with the condition. A copy of ESI's certification to Comcast, and a copy of Comcast's email notifying ESI of the rejection of its proposal, are included as Attachments B and C. The contrary assertion by Comcast's Declarant, Ms. Gaiski, is thus demonstrably wrong (which, of course, undermines the credibility of the remainder of her statement). According to ESI executives, in fact Ms. Gaiski advised ESI that its programming would be considered without ESI having to submit a formal proposal, but ESI opted instead to participate in Comcast's process. ESI representatives also had multiple conference calls and in-person meetings with Comcast representatives, including Ms. Gaiski, concerning its proposal.

Second, as to Comcast's criteria for selection, Comcast advises (at page 6 of the Opposition) that one of three factors was the "content-management experience" of the applicants. But neither Aspire nor Revolt had any apparent experience at anything. Indeed, Aspire was not even established until February, 2012, shortly before it was named as a winner by Comcast. Does it not seem odd that scores of applicants – at least one of which (ESI, a 100% African American-owned company) had a years-long track record – were summarily rejected as early as July, 2011, but the winners announced six months later turned out to be two brand-new start-ups, one of which had been formed only weeks before the announcement?

Third, Comcast pooh-poohs ESI's programming, claiming that that programming does not "enjoy market acceptance" and that the rejection of ESI's proposal mirrors the "judgment of many other providers". In fact, to the contrary, ESI's programming is carried on scores of MVPDs reaching nearly 80,000,000 subscribers. That plainly reflects very substantial "market acceptance". Indeed, Comcast is in the noticeable minority when it comes to carriage of ESI programming.

of diversity and economic inclusion. The commitments in the MOU tacitly acknowledged the regrettable scarcity of such programming available on Comcast systems, and seemed on their face to constitute a determination to at least try to rectify that scarcity. The Commission appropriately recognized the obvious public interest benefits of such rectification and incorporated them in its order.

38. But, as it now turns out, Comcast's "commitment" was nothing but blue smoke and mirrors, a charade apparently intended to dupe the Commission into approving its merger. As the Petitioners have demonstrated, Comcast's claims of compliance with its "commitment" are demonstrably bogus. Instead of working to benefit true, 100% African American-owned and operated media, Comcast and its coterie of friends and relations (who happen to be almost exclusively white) have concocted a couple of entities that, even with the little information that is publicly available, fall far short of any conventional concept of diversity and economic inclusion. So Comcast's supposed compliance with its commitment has, in real effect, amounted to little more than an opportunity for Comcast and its white coterie to reap the benefits while 100% African American-owned and controlled program producers are left in the back of the bus.

39. While this is presumably just what Comcast had in mind, it cannot be what the Commission intended.

40. And Comcast itself has now pulled back the curtain on its duplicity. In response to the Petition, Comcast has not come forward with a full and detailed demonstration of its bona fide compliance with its own "commitment". No. Instead, it instead purports to slam the door on any Commission investigation, saying that the Commission has no authority to ask the questions necessary to determine the extent of Comcast's supposed compliance. This contumacious response alone should signal to the Commission that further detailed investigation is absolutely essential here. Moreover, to the extent that Comcast has engaged in a "bait-and-switch" maneuver by

appearing to promise one thing while delivering quite another, the Commission could easily conclude that, in advancing its "commitment" in the first place with the obvious intent that the Commission would rely on it, Comcast has engaged in misrepresentation or, at the very least, lack of candor that itself warrants investigation. The Commission¹¹ should, must, be able to rely on the representations of its regulatees, and where it is clear – as here – that an applicant's representations have been far less than candid, the need for, and propriety of, an investigation and appropriate sanctions is obvious.

41. If the Commission is in fact interested in promoting diversity and economic inclusion, it must not let Comcast control the playing field. It is the Commission, after all – *not* Comcast – that determines where the public interest lies. Comcast cannot – *must* not – be allowed to block valid efforts by the Commission to perform its statutory duties. The Petitioners renew their request that a detailed and searching investigation of the matters described above and in their Petition be undertaken immediately.

Respectfully submitted,

/s/ Harry F. Cole *Harry F. Cole*
Harry F. Cole

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
703-812-0483
cole@fhhlaw.com

*Counsel for the National Association of African
American-Owned Media and
Entertainment Studios, Inc.*

April 15, 2016

¹¹ This, of course, includes individual Commissioners, too. In this case, Commissioner Clyburn, for one, plainly considered Comcast's representations to be honest and enforceable – why else would she have admonished Comcast about compliance in her concurring statement?

Attachment A

DECLARATION

Janice Arouh, under penalty of perjury, hereby declares the following to be true and correct:

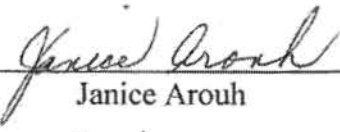
1. I am President, Network Distribution and Marketing, of Entertainment Studios, Inc. ("ESI"). I am preparing this Declaration for submission to the Federal Communications Commission ("FCC") in connection with the Petitioners' Reply to the Responses of Comcast, Aspire and Revolt relative to the Petition submitted by ESI and the National Association of African American-Owned Media.

2. In a letter to the FCC, an executive of Revolt Media and TV LLC ("Revolt") suggests that Revolt has been treated well by Comcast. But, based on my perception of statements made by Congresswoman Maxine Waters, I understand that Revolt representatives have reached out to her because of their concern about possible disruption of their distribution and license fee arrangements with Comcast.

3. Comcast suggests at several points in its Opposition that ESI's programming has failed in the marketplace. That is not true. To the contrary, the programming of ESI – a 100% African American-owned and operated company – is carried on scores of cable systems nationwide and reaches almost 80,000,000 subscribers.

4. In a Declaration attached to the Comcast Opposition (and in the Opposition itself), Comcast claims that ESI did not submit a formal proposal to Comcast for carriage in response to Comcast's requests for proposals from African American programmers. ESI did in fact submit a formal proposal to Comcast in response to the request for proposals issued in connection with Comcast's supposed effort to comply with the condition. A copy of the transmittal letter of that proposal, dated May 27, 2011, is included as Attachment B. ESI

received confirmation of receipt of that proposal from Comcast in the form of an email, dated May 31, 2011, which required a counter-signature. A counter-signed copy was duly transmitted to Comcast as directed by Comcast. In addition, out of an excess of caution in order to ensure that appropriate Comcast officials were aware of the timely filing of ESI's proposal, I sent a separate copy of the counter-signed form to Gregory Rigdon, Comcast's Executive Vice President of Programming, also on May 31, 2011. A copy of that letter (accompanied by a copy of the counter-signed form) is included as Attachment C hereto. In addition to this correspondence, I participated in multiple conference calls and in-person meetings about the ESI proposal with Comcast officials (including Ms. Gaiski, who inexplicably – and incorrectly – states in her Declaration that ESI did not submit a proposal).



Janice Arouh
Date: April 15, 2016

Attachment B



May 27, 2011

Comcast-NBC Universal Joint External Diversity Advisory Council:

Attached, please find our proposal for Comcast Cable carriage of the **Entertainment Studios Networks**. Today we are the only network group that is African American wholly-owned, and we operate the only 100% African American owned networks that are up and on the air for consumers.

I founded **Entertainment Studios** 18 years ago from my dining room table, and have successfully created the largest independently owned media company in the country, which now boasts more than 27 shows in global syndication, and six 24-hour high definition television networks.

Founded in 1993, **Entertainment Studios** is the largest independent producer/distributor of first-run syndicated television programming for broadcast television stations, cable networks, mobile devices, and multimedia platforms worldwide. **Entertainment Studios** is the only company with wholly-owned African American cable networks up-and-running, and a library of over 4,000 hours of owned content distributed on the largest content platforms in the world. As an African American, independent media corporation, **Entertainment Studios** has been instrumental in developing general market content that continues to depict positive images of all ethnic groups across multiple platforms.

Two years ago, we successfully launched six 24 hour high definition cable television networks across multiple platforms, and are in the process of launching a seventh network, **Legacy.TV**, dedicated to African American history and biographies, as well as a portfolio of 3D networks. The six HD networks launched on the Verizon FiOS platform, which has a 40% overlay with Comcast Cable.

For 18 years, **Entertainment Studios** has been a self-financing, profitable corporation that carries no debt. The investment capital has been generated from the success of our global television syndication operation. All the content is original programming produced and owned exclusively by **Entertainment Studios**. Additionally, **Entertainment Studios** can promote within our 27 nationally syndicated television programs, seen by approximately 25-million viewers per week on broadcast television stations, awareness of the networks available on Comcast Cable.

Thank you in advance for your consideration.

Continued success,

Byron Allen
Founder, Chairman & Chief Executive Officer
Entertainment Studios Networks, Inc.

Attachment: Entertainment Studios Networks' Proposal

Attachment C

May 31, 2011

Mr. Gregory Rigdon
Executive Vice President, Programming
Comcast Cable
One Comcast Center
Philadelphia, PA 19103-2838

RE: Entertainment Studios Networks RFP

Dear Greg,

Trust all is well with you.

Enclosed for your review is the Entertainment Studios Networks' proposal which was submitted through the online RFP process.

Please let me know you if you have any questions.

Best regards,



Janice Arouh

cc: Alan Dannenbaum
Jennifer Gaiki
David Jensen

MB/jaa
Enclosure



Comedy.tv



MyDestination.tv



RECIPETV

Explore Your Passions



Comcast Corporation
One Comcast Center
Philadelphia, PA 19103-2838

May 31, 2011

Via Electronic Mail

Mr. Byron Allen
Chairman & CEO
Entertainment Studios Networks, Inc.
c/o John McDonald
John@es.tv

Re: Comcast Diverse Channel Proposal

Dear Mr. Allen:

Thank you for submitting a new independent channel proposal to Comcast.

In order to avoid any possible misunderstanding and to protect you and us, we have adopted a uniform policy for consideration of ideas submitted to it by persons outside its organization. We will not review your proposal until it receives your acknowledgement and acceptance of this policy and the other disclaimers described in this letter.

In order to avoid any possible misunderstanding and to protect you and us, we have adopted a uniform policy for consideration of ideas submitted to it by persons outside its organization, as set forth in this below. We will not receive your submission in confidence and no disclosure by you will establish a confidential relationship between you and us. Any submission by you in no way obligates us to review your submission, enter into any transaction with or make any investment in you or your idea. We accept no responsibility for the safe arrival, handling or return of any submitted material.

Please be aware that we have a number of employees engaged in the development of ideas and business opportunities. We also rely on brokers, attorneys or other qualified representatives known to us to assist us in this regard. Before your idea can be considered by us, you must understand that such an idea may be already known to us, in whole or in part, prior to your submission.

Again, please bear in mind that we may find that your idea is not new, is in the public domain or has already been investigated and considered by us. Also, we have no obligation to adopt, use or otherwise pursue your submission, reveal its reaction to your submission, disclose any information regarding its own activities or related ideas or reveal the reasons for its decision.

hA

Mr. Byron Allen
May 31, 2011
Page 2

If you do not clearly understand the terms and conditions set forth above, you should consult with an attorney before providing any information about your idea to us. You, of course, must be the sole judge of the protection you need and desire.

We are not obligated to select any proposal submitted through this process. The channels that we launch may come from other sources and may be presented to or solicited by us after May 31, 2011.

Properly submitted proposals will be reviewed by our screening committee. Factors our screening committee will consider include:

1. Proposed content of channel
2. Management experience
3. Ability to secure financing
4. Overall value proposition for our customers

Finally, we are not accepting any proposals or ideas for individual programs, series or movies.

Your acknowledgement and acceptance of the policies and disclaimers described in this email are required before Comcast will review and consider any proposals or other materials submitted by you.

Please return an executed copy of this agreement to me at Justin_smith@Comcast.com within five (5) business days. Consideration of your proposal will commence as soon as we have received your executed acknowledgment. A response will be sent to the contact information you provide.

Sincerely,


Justin Smith
Vice President, Senior Deputy General Counsel
Comcast Corporation

AGREED TO AND ACCEPTED BY:

Corporate or Business Name (if applicable)

By: 

Name: BYRON ALLEN

Title: CEO

Date: 5/31/2011

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that, on this 15th day of April, 2016, I have caused copies of the foregoing "Consolidated Reply to Responses of Comcast, Revolt and Aspire" to be sent by electronic mail or placed in the U.S. mail, first class postage prepaid (as indicated below), addressed to the following:

The Honorable Tom Wheeler, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email – Tom.Wheeler@fcc.gov)

The Honorable Mignon Clyburn, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email – Mignon.Clyburn@fcc.gov)

The Honorable Jessica Rosenworcel, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email – Jessica.Rosenworcel@fcc.gov)

The Honorable Ajit Pai, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email – Ajit.Pai@fcc.gov)

The Honorable Michael O'Rielly, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email – mike.o'rielly@fcc.gov)

Jonathan B. Sallet, General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email – Jonathan.Sallet@fcc.gov)

Mehssa M. Ingram, Vice President
Business Affairs and Channel Operations
ASPiRE
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Atlanta, Georgia 30337
(By first class mail)

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1875 K Street, N.W.
Washington, D.C. 20006
Counsel for Comcast Corporation
(By first class mail)

Kathryn A. Zachem
David Don
Regulatory Affairs
Lynn R. Charytan
Julie P. Laine
Comcast NBCUniversal Transaction Compliance
Francis M. Buono
Ryan G. Wallach
Legal Regulatory Affairs
Comcast Corporation
300 New Jersey Avenue, N.W., Suite 700
Washington, D.C. 20001
(By first class mail)

Keith T. Clinkscales, Chief Executive Officer
Revolt Media and TV LLC
1700 N. Broadway – 17th Floor
New York, New York

/s/ Harry F. Cole
Harry F. Cole

Harry F. Cole
by asp